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No. 86-883

In the Supreme Court of the United States

OCTOBER TERM, 1986

NESCCO, INC., AND BALARAMA'S ENTERPRISES, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that a search warrant executed by the Food and Drug Administration (FDA) violated the Fourth Amendment's requirement of particularity.

1. This case arose out of the FDA's investigation of petitioners, who allegedly were manufacturing and marketing cocaine substitutes in violation of 21 U.S.C. 331(a) and (k). Section 331 prohibits the following acts:

> (a) The introduction or delivery for introduction into interstate commerce of any * * * drug * * * that is misbranded.
>
> * * * * *
>
> (k) * * * the doing of any * * * act with respect to, a * * * drug * * *, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being * * * misbranded.

In the FDA's view, marketing cocaine substitutes without specifying the active ingredients of the substances (see 21 U.S.C. 352(e)(1)(A)(ii)), or without providing adequate directions for the use of the substances (see 21 U.S.C. 352(f)(1)), constitutes the misbranding of drugs, in violation of Section 331.

In 1983, the State of California enjoined petitioner Balarama's Enterprises, Inc., from manufacturing, packaging, marketing, selling, or distributing Benzocaine, Lidocaine, Tetracaine, and Procaine—anesthetic drugs often diverted to illegal use as cocaine substitutes (Pet. App. A5). The injunction had little practical effect, however, as the FDA learned when an employee of Balarama's, arrested for possession of cocaine, was found with roughly 2000 leaflets from Balarama's entitled "Cocaine." Each leaflet stated that the product advertised was a synthetic substitute for cocaine. *Id.* at A5-A6. The FDA obtained a copy of petitioner's catalogue, which listed many items for sale as incense with commercial names suggesting that the incense was to be used as a cocaine substitute. Some of the products even bore a label stating, "if ingested or inhaled, may cause stimulation." *Id.* at A6. An agent of the FDA placed orders with and

received from Balarama's some of these cocaine substitutes (*id.* at A8).

To further its investigation, the FDA in 1984 decided to search Balarama's principal place of business, as well as a warehouse leased in the name of NESCCO, which the FDA had learned operated as an alter ego of Balarama's (Pet. App. A9). Based on affidavits by an FDA inspector detailing the information the FDA possessed regarding Balarama's activities, the FDA obtained warrants to search both premises.[1] Items 1 through 14 in the search warrants listed 14 different drugs that were used as cocaine substitutes (see *id.* at A15-A16, A18-A19). Item 15 (*id.* at A16, A19-A20) provided for the seizure of:

> All other articles of drug (which include components of drugs); labeling for drugs; orders for drugs received in the mail and any checks or money orders contained therein; records of orders for drugs received by telephone; receiving and shipping records for drugs and drug materials; all other records, including telephone records and computerized records, which may reflect the purchasing, ordering, sale, repacking, distribution, or other disposition of drugs; checks from U.P.S. for C.O.D. shipments of drugs; personal or business correspondence relating to the purchasing, ordering, sale, repacking, distribution, or other disposition of drugs; and other fruits and instrumentalities of crimes which are evidence of violations of, or in violation of, 21 U.S.C. 331(a) and (k).

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[1] Petitioners have not challenged the court of appeals' determination that the FDA established probable cause for the search.

In executing the warrants at both premises, United States marshals seized a large quantity of substances that they believed were intended to be used as cocaine substitutes. The marshals also seized business records relating to transactions in those drugs. Pet. Supp. App. A22, A24-A27. The business records were subsequently returned (*id.* at A22). No criminal charges are currently pending against petitioners (*id.* at A21-A22).

b. On December 6, 1984, petitioners moved in district court for return of the seized property that the FDA had not already returned.[2] The district court denied the motion, holding that the FDA had established probable cause to believe that 21 U.S.C. 331(a) and (k) had been violated. The court concluded that the magistrate "properly issued a warrant to search for and seize items identical to those purchased by the FDA agents, those lawfully observed by affiant, and generic items for which objective articulable standards were provided. The numerous items found on the premises, whether specifically identified in the warrant or clearly falling within the generic category articulated in section 15 of that document, were properly seized." Pet. Supp. App. A22 (citation omitted).

The court of appeals affirmed, holding that the warrants were sufficiently particularized to meet constitutional standards. The court noted that items 1 through 14 "consist of fourteen different items which might be drugs identified by the names given in a Balarama's catalog sent to Agent Pierkarski. Such descriptions are obviously sufficiently particularized" (Pet. App. A10). The only remaining question was

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[2] The property retained by the FDA consisted of the drugs, cartons, and labels listed in Pet. Supp. App. A24-A27 (*id.* at A22).

whether item 15, which authorized the seizure of drugs, labels, business records, and "other fruits and instrumentalities of crimes which are evidence of violations of * * * 21 U.S.C. 331(a) and (k)," met the Fourth Amendment standard of particularity.

While the court commented that the question was a "close one" (Pet. App. A10), it held that the warrants as a whole satisfied the particularity requirement. The court initially noted that the statutory limitation in item 15, restricting the search to the fruits or instrumentalities of a violation of 21 U.S.C. 331, did not in and of itself provide a sufficient limitation. In the court's view, "where a statute provides the only limitation on a search, the executing officers are forced to interpret the statute in limiting their search, a task they may be unqualified to perform." Pet. App. at A11. The court held, however, that item 15 must be considered in the context of the framework set by items 1 through 14. Relying upon *Andresen* v. *Maryland*, 427 U.S. 463, 480-482 (1976), the court stated (*id.* at A12) that

> item 15 cannot be read in a vacuum and must instead be construed in light of the presence of items 1-14. Because items 1-14 provide a sample of names of suspected misbranded drugs, we believe that they implicitly limited item 15's otherwise unbounded reference to all other drugs (and labeling and paperwork relating to drugs) to only those drugs with names of the same nature as those identified in items 1-14.

The court further explained that the government could not have specified the precise names of all the drugs that were likely to be misbranded, since the government would have no way of knowing all the street names that could be used for the cocaine sub-

stitutes (Pet. App. A13). The court concluded, therefore, that the warrants as a whole provided sufficient guidelines for the officers serving the warrants and thus were consistent with constitutional standards.

2. Petitioners contend that the Ninth Circuit's "implied limitation" rule of particularity sanctions the use of general warrants and is thereby inconsistent with the Fourth Amendment. In addition, petitioners assert that the decision below creates a conflict among the circuits.

a. Far from articulating a "novel standard" (Pet. 7) or one that is "freshly coined" (Pet. 6), the court of appeals simply applied the approach used by this Court in *Andresen* v. *Maryland*, 427 U.S. 463 (1976). There, state law enforcement officials carried out an investigation of petitioner's real estate settlement activities. The officials procured search warrants for petitioner's offices, detailing various items to be seized in connection with petitioner's role in the conveyance of Lot 13T, a particular parcel in a real estate development project. While petitioner conceded that the warrants were for the most part "models of particularity" (427 U.S. at 479), he argued that they were rendered fatally general by the addition of the phrase "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." That phrase was included in the warrant at the end of a comprehensive list of items to be seized. As in this case, the defendant in *Andresen* argued that the final phrase should be read in isolation from the other parts of the warrants, and that standing apart the phrase would have permitted the seizure of items that were evidence of any conceivable crime. This Court rejected that argument. It held instead that the final phrase should be read in context with the full text of

the warrants, which authorized the search for and seizure of material relevant only to petitioner's activities in connection with Lot 13T. So construed, the Court held that the warrants comported with Fourth Amendment standards of particularity. 427 U.S. at 479-482.

The court of appeals in this case adopted a similar tack. The court construed item 15 in the warrants, which authorized the seizure of drugs, labels, and paperwork, to refer only to the types of drugs listed in items 1 through 14. Just as the language "together with other fruits, instrumentalities and evidence of crime at this [time] unknown" in *Andresen* was interpreted to be limited to evidence of the crime of false pretenses with respect to Lot 13T, so the search and seizure authorized in item 15 was limited to cocaine substitutes of the type listed in items 1 through 14, along with the components and labels for those drugs. The list of drugs in items 1 through 14 therefore provided the officers serving the warrants with sufficient guidelines to determine which items to seize.

The court of appeals properly noted that it would be unrealistic to hold the government to a standard of much greater precision. While the government was aware of many of the street names used for cocaine substitutes, the court found that government agents could not have foreseen all the names that petitioners might have given to the cocaine substitutes.[3]

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[3] Petitioners point out (Pet. 12) that the affidavits in support of the search warrants named and referred to 57 different product items while only 14 were listed in the warrants themselves. Yet petitioners do not contest that the 14 drugs listed were sufficient to apprise those serving the warrants of the type of drug to be seized. Nor do they dispute that it

Thus, items 1 through 14 were as precise as they could practically be, by providing a list of the most common "chemical names and street-slang terminology often associated with cocaine or cocaine substitutes" (Pet. App. A13). As the Ninth Circuit has previously observed, "[s]o long as officers can distinguish between legally and illegally possessed property on the basis of objective, articulated standards, a search warrant based on probable cause may direct inspection of premises containing a generic class of items, a portion of which are believed to be stolen or contraband." *United States* v. *Pollock*, 726 F. 2d 1456, 1466 (1984).[4]

In sum, the Ninth Circuit correctly construed this Court's decision in *Andresen* to hold that an otherwise overbroad authorization for a search is sufficiently particularized if, in the context of the entire warrant, there are reasonably objective standards to govern the executing officers' search. As applied in this case, the limitations contained in items 1 through 14, namely that the misbranded drugs be those intended to be used as cocaine substitutes, provided the requisite standards to satisfy the requirements of the Fourth Amendment.

b. Nor does the court's opinion, as petitioners suggest (Pet. 9), give rise to a split among the circuits.

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would have been impossible for the government to have prepared a comprehensive list of the wide variety of merchandising names used to identify different cocaine substitutes.

[4] Petitioners assert (Pet. 13) that the marshals seized items that were not similar to those enumerated in items 1 through 14. The warrants, however, also authorized the seizure of the "components of drugs" and "labeling for drugs," which would include, inter alia, cutting and packaging agents of the sort cited by petitioners. See Pet. Supp. App. A24-A27.

While petitioners are correct that some courts of appeals have held that limiting a search to items that are evidence of the violation of a certain statute is generally not specific enough, see, *e.g.*, *United States* v. *Gomez-Soto*, 723 F.2d 649 (9th Cir.), cert. denied, 466 U.S. 977 (1984); *United States* v. *Roche*, 614 F.2d 6 (1st Cir. 1980), the cases cited by petitioner do not hold that such searches violate the Fourth Amendment if the rest of the warrant in effect provides standards circumscribing the discretion of the searching officers. Indeed, the courts of appeals have agreed with the Ninth Circuit in applying *Andresen* so that "the 'general' tail of the search warrant will be construed so as not to defeat the 'particularity' of the main body of the warrant." *United States* v. *Abrams*, 615 F.2d 541, 547 (1st Cir. 1980). See also *Milliman* v. *Minnesota*, 774 F.2d 247, 250 (8th Cir. 1985) ("Of course whether a warrant fails the particularity requirement cannot be decided in a vacuum. The court will base its determination on such factors as the purpose for which the warrant was issued, the nature of the items to which it is directed, and the total circumstances surrounding the case.") (citation omitted); *United States* v. *Wuagneux*, 683 F.2d 1343, 1349-1351 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983); *United States* v. *Jacob*, 657 F.2d 49, 51-52 (4th Cir. 1981), cert. denied, 455 U.S. 942 (1982); *United States* v. *Johnson*, 690 F.2d 60, 64 (3d Cir. 1982), cert. denied, 459 U.S. 1214 (1983).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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